No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

vs.

RADCLIFF MATERIALS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION AND BRIEF OF THE CORRUGATED CONTAINER CLASS IN M.D.L. 310 AS AMICUS CURIAE

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MOTION OF THE CORRUGATED CONTAINER CLASS IN M.D.L. 310 FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The certified class of purchasers of corrugated containers and sheets in *In re Corrugated Container Antitrust Litigation,* M.D.L. 310 (S.D. Tex.) (herein *"amicus"* or "The Corrugated Class") moves the Court for leave to submit this brief as *amicus curiae* and urges this Court to affirm the judgment of the Fifth Circuit and refuse to create new rules of contribution and claim reduction in antitrust cases.

INTEREST OF THE AMICUS CURIAE

Amicus is the Certified Class of purchasers of corrugated containers and sheets in M.D.L. 310. That action was brought by more than 100 purchasers of corrugated containers and

sheets against 37 corrugated manufacturers for fixing the prices of containers and sheets in violation of the federal antitrust laws. Prior to completion of the trial, all defendants but one settled with the Class, paying more than $300 million in settlement. The one non-settling defendant, the Mead Corporation ("Mead"), proceeded to trial. After a 4½ month trial, the jury found Mead guilty of conspiring with at least 20 other corrugated manufacturers to fix the prices of corrugated containers and sheets.[1]

The Class numbers more than 300,000 and includes members ranging in size from the largest corporations in the country, including most of the Fortune 500, to small neighborhood and family businesses. All Corrugated Class members have one thing in common: they purchased corrugated containers or sheets directly from one or more of the defendants in M.D.L. 310, and they were damaged by those defendants who participated in a classic price-fixing scheme in violation of Section 1 of the Sherman Act.[2]

The Corrugated Class' interest in the issues raised by Petitioner and the various *amici* who have filed briefs is as follows:

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[1] The other M.D.L. 310 defendants found by the jury to have conspired with Mead are: Alton Box Board Company; Boise Cascade Corporation; Consolidated Packaging Corporation; Container Corporation of America; The Continental Group, Inc.; Crown Zellerback Corporation; Hoerner Waldorf Corporation; Inland Container Corporation; International Paper Company; Interstate Container Company; MacMillan Bloedel, Inc.; Olinkraft, Inc.; Owens-Illinois, Inc.; Packaging Corporation of America; St. Joe Paper Company; St. Regis Paper Company; Southwest Forest Industries, Inc.; Stone Container Corporation; Weyerhauser Company.

[2] A rare insight into how such a widespread price-fixing scheme operated in a sister industry is found in the Seventh Circuit's opinion in *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117 (7th Cir., 1978).

1. The long standing rule of no contribution which is challenged by the Petitioner is of vital importance to the continued viability of private enforcement of the antitrust laws through the class action device. Not only are the manageability and settlement potential of such actions threatened by abandonment of the no-contribution rule, but the protections contained within the class action device itself make inapplicable certain of the policy considerations suggested by the Petitioner and others supporting contribution. Yet the case before the Court is not a class action and fails to bring to the Court's attention these crucial concerns and differences which the Corrugated Class *amicus* will provide.

2. There is at present no brief filed with this Court by any *plaintiff*, as the dispute in the case before the Court involves only defendants and third party defendants and no threat to the plaintiff. This Corrugated Class *amicus* will provide the Court with a view of the important concerns of plaintiffs, including management of the case and settlement potential, which are necessary to foster private damage actions which this Court has always found to be essential to the effective enforcement of the antitrust laws.

3. The *Texas Industries* litigation presents the questions whether contribution should be permitted where major co-conspirators have been omitted from the lawsuit. As certain *amici* concede, this is a rare occurrence, for antitrust plaintiffs typically join all likely defendants, *see Amicus* Brief of Olson Farms, Inc. at 16; *Amicus* Brief of Georgia-Pacific Corporation and Packaging Corporation of America at 5. No claim of collusion or failure to name conspicuous co-conspirators can be leveled against the *Corrugated Class* plaintiffs. Even if measures were necessary to deal with the problem of omitted defendants in cases like *Texas Industries*, different considerations apply in cases like M.D.L. 310 and can be best presented by *amici* from that case.

4. Those defendants in M.D.L. 310 who have filed *amicus* briefs in this cause urging the Court to create new private rights of contribution have also sought a new right to claim reduction in antitrust cases. In view of the jury verdict against Mead for price fixing in M.D.L. 310 and the likelihood that the trial court will award a substantial judgment for damages against Mead, the members of the Corrugated Class have a vital interest in avoiding any risk of having that damage judgment diminished should this Court create a new right of claim reduction.

5. Although all M.D.L. 310 defendants except Mead have settled with the Corrugated Class, approval of those settlements by the district court is now on appeal to the Fifth Circuit. A reversal of the orders approving the settlements could result in M.D.L. 310 starting afresh, in which case a new rule allowing contribution (or claim reduction) could have a serious and adverse effect on the rights of the Corrugated Class members.

6. Mead argues that it has preserved its right to assert claims for contribution and claim reduction against other M.D.L. 310 defendants, *Amicus* Brief at 3; and certain settling defendants in M.D.L. 310 have claimed that if this Court were to create a retroactive rule of contribution, such a ruling might affect the settlements already made. The Corrugated Class denies that these contentions of Mead and certain M.D.L. 310 defendants have any merit, but these issues have been raised, and an affirmance by this Court of the present rule against contribution and claim reduction would resolve those issues in a manner consistent with the best interests of the Corrugated Class members.

7. Those defendants in M.D.L. 310 who have filed *amicus* briefs supporting contribution have presented a picture of that case which is so distorted and bears so little resemblance to what in fact occurred that it is important to have the record set straight.

For the foregoing reasons, the Corrugated Class in M.D.L. 310 asks leave to file the following brief as *amicus curiae.*

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BRIEF OF THE CORRUGATED CONTAINER CLASS IN M.D.L. 310 AS AMICUS CURIAE

SUMMARY OF ARGUMENT

The long standing common law rule disallowing contribution is particularly well-established where intentional conduct, like price-fixing, is involved. In the 80-year history of the antitrust acts, only one court has permitted contribution, and that case did not involve either price fixing or a class action and the guarantee of good-faith court-approved settlement which class actions insure.

This Court should not create a new rule allowing contribution, particularly in view of the intense study given this issue recently by Congress. The policy decisions and impact on the country's economy involved in formulating any rule of contribution are best considered by the legislative branch, not the judicial. The damages provisions of the antitrust laws, granting

mandatory treble damages and attorney fees to prevailing plaintiffs do not suggest any congressional intent that culpable defendants should be able to lighten their own burden by shifting a portion of the judgment to other defendants. To the contrary, allowing contribution could drastically upset the legislative scheme by eroding the effective deterrent of joint and several liability and removing the incentives to private enforcement, which is an essential adjunct to governmental enforcement of antitrust laws.

The no-contribution rule fosters deterrence and is based on sound economic theory. The strict sanctions of the antitrust laws must not be undercut by a contribution rule that would allow intentional wrongdoers to dilute the burden of their wrongdoing by treating the substantially diminished cost of liability for price-fixing as just another expense of doing business.

The no-contribution rule is also essential to settlement, and settlements must not be chilled if plaintiffs are to be capable of managing the complex litigation which inevitably arises as a result of massive, nationwide price-fixing conspiracies like that presented in M.D.L. 310. If settlements could not be achieved, many plaintiffs would be discouraged from initiating private antitrust lawsuits, and even where suits were brought, the presentation to the jury would be unwieldy. Yet contribution would greatly inhibit settlements because defendants would be unable to buy peace unless plaintiffs were willing to give up too large a portion of their total claim against remaining defendants.

The M.D.L. 310 defendants' plea for "fairness" is nothing more than an appeal for an end to joint and several liability. They ask the Court for lenient treatment of price fixers and a judicial re-writing of the antitrust laws. There is no claim of collusion or anything but evenhanded treatment in M.D.L. 310, where the lower court's continued and close supervision, required under Fed. R. Civ. P. 23, insured good-faith dealings

and fair and reasonable settlements. For those defendants, such as Mead, who refused to settle and chose to stand trial, no purpose is served by diluting their damages after they have been found guilty of conspiring to fix prices. Any leniency shown to those found liable would only encourage price fixing in the future.

"Claim reduction," as the M.D.L. 310 defendants use the term, arises only in a settlement context and is not an issue in this case. Certain *amici's* arguments for their form of claim reduction are, in reality, claims for contribution from the plaintiffs rather than from co-conspirators. The only proper form of reduction of plaintiffs' claims, *pro tanto* (dollar-for-dollar) claim reduction, has long been established in antitrust law and insures that plaintiffs will not receive a multiple recovery. The version of claim reduction which certain M.D.L. 310 defendants propose would reward those who are found guilty of antitrust violations at the expense of plaintiffs, and would make antitrust actions exceedingly complex and settlement virtually impossible.

Finally, the claims of abuse, coercion, legalized blackmail of innocent defendants, settlement stampedes and the full parade of horribles blamed on the no-contribution rule by the M.D.L. 310 defendants, and Mead most particularly, are simply hogwash. The way for businesspeople to avoid the serious treble damage penalties under the antitrust laws is not by this Court creating new rights of contribution or "claim reduction" but by simply not conspiring to fix prices, as the jury in M.D.L. 310 found Mead did with at least 20 other corrugated manufacturers. Innocent businesspeople have no reason to fear; those antitrust actions which lack merit are consistently thrown out by the courts, or defendants are found not liable by juries. The 37 defendants in M.D.L. 310 who paid more than $300 million in settlements of the Class' claims against them did so not because of "legalized blackmail" but because they

recognized the very real likelihood that a jury would find them, like Mead, guilty of conspiring to fix prices in the corrugated industry.

ARGUMENT

I. THE RULE AGAINST CONTRIBUTION IN ANTITRUST CASES SHOULD NOT BE JUDICIALLY MODIFIED

A. The No-Contribution Rule is Well Established in Antitrust Cases

At common law, contribution is not allowed among joint tortfeasors. This rule has been in effect for 150 years in the United States, *Bartle* v. *Nutt*, 29 U. S. (4 Pet.) 184 (1830). *See also, Union Stockyards Co. of Omaha* v. *Chicago, Burlington & Quincy Ry. Co.*, 196 U.S. 217 (1905); *Washington Gaslight Co.* v. *Lansden*, 172 U.S. 534 (1899); *Selz* v. *Unna*, 73 U.S. (6 Wall.) 327 (1867); *City of Chicago* v. *Robbins*, 67 U.S. (12 Black) 418 (1862). As this Court stated in *Union Stockyards:*

> [T]he general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done.

196 U.S. at 224.

With only one exception, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979), the rule denying contribution has been followed consistently by every court addressing the question in antitrust cases. *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶62,995 (10th Cir. 1979); *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897 (5th Cir. 1979); *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. Oct. 30, 1979); *Goldlawr, Inc.* v. *Shubert*, 276 F. 2d 614 (3rd Cir. 1960); *Newark Motor Inn Corp.* v. *Fleck*, 1980-2 Trade Cases ¶63,465 (D.N.J. 1980); *In re Fine Paper Antitrust Litigation*, M.D.L. 323 (E.D. Pa. August 3, 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cases (CCH) ¶62,717 (E.D. Pa. 1979); *In re Ampicillin Antitrust*

Litigation, 917 ANTITRUST & TRADE REG. REP. (BNA) 1 (D.D.C. 1979); *Eastern Sugar Antitrust Litigation,* M.D.L. 201A (E.D. Pa. 1979); *El Camino Glass* v. *Sunglo Glass Co.,* 1977-1 Trade Cases (CCH) ¶61,533 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.,* 298 F. Supp. 1339 (S.D. N.Y. 1969).

Even though the no-contribution rule has largely been abolished where negligent conduct is involved, it continues to be well-established for intentional torts. The Uniform Contribution Among Tortfeasors Act, as revised in 1955, denies any right of contribution to a party which has intentionally caused or contributed to the injury, U.C.T.A. § 1(c). Twenty-two of the states which have considered the issue have expressly disallowed contribution for intentional torts,[1] and only five states have allowed it.[2]

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[1] Alaska: Alas. Stat. § 09.16.020(1); California: West's Ann. C.C.P. § 875; Colorado: Col. Rev. Stat. Tit. 13, Art 50.5-101(3); District of Columbia: *Georges Radio* v. *Capital Trans. Co.,* 126 F. 2d 219 (D.C. Cir. 1942); Florida: F.S.A. § 768.31(2)(c); Georgia: Ga. Code Ann. § 105-2012(1); Iowa: *Best* v. *Yerkes,* 247 Iowa 800, 77 N.W. 2d 23(1956); Kentucky: Ky. Rev. Stat. § 412-030; Maine: *Hobbs* v. *Hurley,* 117 Me. 449, 104 A. 815 (1918); Massachusetts: Ann. Laws Mass. ch. 231 B §§ 1-4 (1979); Michigan: *Moyes* v. *Spartan Asphalt,* 338 Mich. 314, 334 (Mich. 1970); Minnesota: *Murray* v. *Reliance Ins. Co.,* 60 F. R. D. 390 (D. Minn. 1973); Nebraska: *Royal Indemnity Co.* v. *Aetna Casualty & Surety Co.,* 193 Neb. 752, 229 N. W. 2d 183 (1975); Nevada: N. R. S. § 17.255; North Carolina: N.C. Gen. Stat. § 1B-1(c); North Dakota: N.D. Cent. Code Ann. § 32-38-01(3); Ohio: Ohio Stat. Ann. § 2307.31(A); Oklahoma: Okl. St. Ann. Tit. 12 § 832(c); Pennsylvania: *Cage* v. *New York Central Railroad,* 276 F. Supp. 778 (W.D. Pa), aff'd, 386 F. 2d 998 (3d Cir. 1967); Tennessee: Tenn. Code Ann. § 23-3102(c); Virginia: Va. Code § 8-01-34, *Carrier's Insurance Exchange* v. *Truck Insurance Exchange,* 310 F. 2d 653, 658-59 (4th Cir. 1962); West Virginia: *Haynes* v. *City of Nitro,* 240 S.E. 2d 544 (1977).

[2] Delaware: *McLean* v. *Alexander,* 449 F. Supp. 1251 (D. Del. 1978); Maryland: *Webster Motor Car Co.* v. *Zell Motor Car Co.,* 234

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While this Court has permitted contribution where negligent conduct is involved, *United States* v. *Reliable Transfer Co.*, 421 U. S. 397 (1975); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106 (1974), price-fixing involves intentional conduct. In antitrust cases, the no-contribution rule is thus a sound one which should be followed.

B. Congress Is the Appropriate Forum to Deal with the Contribution Question

If the common law rule against contribution in antitrust cases were ever to be changed, such a decision should be left for Congress rather than being undertaken by the judiciary. Congress is the appropriate body to make the policy decisions required. Furthermore, where Congress has acted against a background of common law, this Court has held that the judiciary has less liberty to interfere.

1. Contribution is a policy question that is best left to Congress

Congress, unlike the Court, has the ability to determine what effect a contribution rule would have on competition. Because of its ability to conduct hearings, to question experts and to finance objective in-depth studies, Congress is by far the best forum to consider and attempt to accommodate the many diverse interests which should be weighed if the common law rule were to be changed. Among the issues which Congress would have to resolve are: the availability of contribution where willful conduct is involved, the availability of contribution where settlements are involved, the appropriate measure of contribution, and whether contribution may be assessed only

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F. 2d 616 (4th Cir. 1956); New Jersey: *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A. 2d 24 (1954); New York: N.Y. Civ. Prac. Law § 1401:3; Rhode Island: *Sousa* v. *Casey*, 111 R. I. 623, 306 A. 2d 186 (1973)

against defendants or against plaintiffs ("claim reduction").[3] These are policy questions best entrusted to Congress. *See Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 345 (1979). As this Court has recognized, especially in the antitrust context:

> Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision making. To analyze, interpret, and evaluate the myriad competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

United States v. *Topco Associates,* 405 U. S. 596, 611-12 (1972).

Evolving state law on contribution illustrates the myriad differing conclusions which can be reached. Thirty-nine of the 44 states which allow any form of contribution do so by statute.[4] Of these states that allow contribution by statute,

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[3] The phrases "claim reduction," "carve-out" and "proportionate liability" as used in the briefs of certain *amici* all amount to contribution from the plaintiffs instead of settling defendants.

[4] Alas. Stat. § 09.16.101 *et. seq.;* Ark. Stat. Ann. § 34-1001 *et seq.;* West's Ann. C.C.P. § 875 *et seq.;* Col. Rev. Stat. Tit. 13, Art. 50.5-101 *et seq.;* Del. Code Ann. Tit. 10 § 6301 *et seq.*; F.S.A. § 768.31; Ga. Code Ann. § 105-2012, § 37-303; Haw. Rev. Stat. § 663-11; Idaho Code § 6-803(1) *et seq.*; Kan. Stat. Ann. § 60-2413(b); Ky. Rev. Stat. § 412-030; La. C.C. Comp. Ed. Art. 2103; Md. Ann. Code Art. 50 § 17; Ann. Laws Mass. ch. 231B § 1 *et seq.*; Mich. C.L.A. § 600.2925; Minn. Stat. Ann. § 604.01; Miss. Code Ann. § 85-5-5; Vernons Ann. Mo. Stat. § 537.060; Mont. Code Ann. § 27-1-703; N.R.S. § 17.225; N.H. Rev. Stat. Ann. § 507:7-b; N.J.S.A. § 2A:53A: 1 *et seq.*; N.M. Stat. Ann. § 41-3-1; N.Y. Civ. Prac. Law § 1401, § 15-108; N.C. Gen. Stat. § 1B-1 *et seq.*; N.D. Cent. Code § 32-38-01; Ohio Stat. Ann. § 2307.31; Okl. St. Ann. § 12-832; Ore. Code ch. 18.430; P.S. Tit. 12, § 2082, Tit. 42 § 8321; R.I. Gen Laws § 10-6-1; S.D. Comp. Laws § 15-8-11; Tenn. Code Ann. § 23-3101;

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fifteen specifically deny contribution for intentional suits while only one, New York, specifically permits it; thirteen specifically preclude suits against settling defendants[5] while eleven specifically permit such suits; and ten base contribution on relative fault[6] whereas three provide for strictly equal shares.[7] The Tenth Circuit recognized the difficulties inherent in any contribution rule:

> Before entering such a complex policy thicket, ... we believe this court should await a clear signal, at least, from the legislative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation.

Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1979-2 Trade Cases ¶ 62,995 at 79,704 (10th Cir. 1979).

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Tex. Civ. Code Ann. Art 2212a § 2b; Utah Code Ann. § 78-27-39; V.S.A. tit. 12 § 1036; Va. Code § 8-01-34; W. Va. Code Ann. § 55-7-13; Wy. Stat. Ann. § 1-1-110.

[5] Contribution is not allowed against settling defendants in Florida, F. S. A. § 768.31(5)(b); Illinois, Ill. Rev. Stat. ch. 70 § 302(c); Massachusetts, Ann. Law Mass. ch. 231 B § 4(b); Michigan, M.C.L.A. § 600.2925d(c); Nevada, N. R. S. § 17.245(2); New York, N.Y. Genl. Oblig. Law § 15-108(b); North Carolina, N.C. Gen. Stat. § 1B-4(2); North Dakota, N.D. Cent. Code § 32-38-04(2); Ohio, Ohio Stat. Ann. § 2307.32(F)(1); Oregon, Ore. Code ch. 18.455(b); Tennessee, Tenn. Code Ann. § 23-3105(b); West Virginia, W.Va. Code Ann. § 55-7-13; Wyoming, Wy. Stat. Ann. § 1-1-113(a)(ii).

[6] Arkansas, Ark. Stat. Ann. § 34-1002(4); Colorado, Col. Rev. Stat. Tit. 13 Art. 50.5-103; Delaware, Del. Code Ann. Tit. 10 § 6302(d); Hawaii, Haw. Rev. Stat. § 663-12; Idaho, Idaho Code § 6-803(3): Minnesota, Minn. Stat. Ann. § 604.02; New York, N.Y. Genl. Oblig. Law § 15-108(a); Rhode Island, R.I. Gen. Laws § 10-6-3; South Dakota, S. D. C. L. Ann. § 15-8-15; Utah, Utah Code Ann. § 78-27-40(2).

[7] Florida, F. S. A. § 768.31(5)(a); Michigan, M. C. L. A. § 600.2925b(a); North Dakota, N.D. Cent. Code § 32-38-02.

To allow contribution may thus open a Pandora's box of problems. While the Court could pick and choose among the various combinations of contribution rules, both procedural and substantive, it would be wiser to leave such decisions to the Congress. The question of contribution, with all its ramifications, is best suited for congressional, not judicial, determination.

2. Because Congress enacted the antitrust laws against a no-contribution background, the courts should not change the rule

When Congress enacted the antitrust laws, it did so against a strong common law background which disallowed contribution—a rule that was *without exception* where intentional torts were concerned. As this Court cautioned in *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S. 256 (1979):

> Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them.

443 U. S. at 273. In *Edmonds,* the Court recognized that by changing a rule which Congress understood to be the law and did not itself choose to modify, the Court might "knock out of kilter" the delicate balance between statutory and common law. *Id.*[8] Congress' reliance on the no-contribution rule is reflected both in the fact that it has not acted to change the law in its 80-

[8] Likewise in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U. S. 282 (1952), the Court stated the principal that, "In the absence of legislation, courts exercising a common law jurisdiction generally have held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors." 342 U. S. at 285. While the Court subsequently decided that a correct reading of the common law of admiralty itself favored contribution, *Cooper Stevedoring Inc.* v. *Fritz Kopke, Inc.,* 417 U. S. 106 (1974), the result leaves intact the reasoning of *Halcyon* suggesting a no contribution rule in the antitrust context.

year history, and in recent amendments, Antitrust Improvement Act of 1976, 15 U. S. C. A. § 15(c), where Congress provided for *parens patriae* actions brought by state attorneys general and expressly reiterated the traditional method whereby non-settling defendants receive dollar-for-dollar credit for amounts received by plaintiffs, but did not provide for contribution. Because the framework of the antitrust laws was set up against this strong no-contribution background and had not been changed by Congress, the Court should be especially hesitant to modify the long-standing common law disallowing contribution.[9]

II. CONTRIBUTION IS INCONSISTENT WITH THE ANTITRUST LAWS

The primary purposes of the antitrust laws are deterrence of would-be wrongdoers and compensation of victims. *Pfizer* v. *Government of India,* 434 U. S. 308 (1978); *Illinois Brick Co.* v. *State of Illinois,* 431 U. S. 720 (1977). The legislative scheme adopted by Congress included provisions to achieve these goals, including criminal penalties, treble damages to civil plaintiffs, and the mandatory award of attorneys fees to the successful civil litigant. 15 U. S. C. § 15. The seriousness of antitrust violations in general and of price-fixing offenses in particular has been underscored repeatedly by the federal courts. *See United States* v. *Consolidated Packaging Corp.,* 575 F. 2d 117, 126 (7th Cir. 1978) (a price-fixing case in an industry related to corrugated containers). The distinctions between the antitrust

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[9] Reserving the contribution question for Congress is particularly appropriate in view of Congress' recent in-depth study of this very question, *see* Hearings before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary, United States Senate, 96th Congress, June 8 and 12, 1979. A bill which would allow a form of contribution has been introduced in Congress, S. 1496. In fact, as Mead points out in its *amicus* brief at 11, the Senate has already considered the specifics of the Corrugated Container antitrust case and the arguments raised by Mead against contribution; and yet neither house of Congress has seen fit to pass the bill.

laws and other statutes is a strong indication that Congress intended to deal more strictly with antitrust wrongdoers.[10]

Contribution is inimical to these primary purposes of the antitrust laws. Contribution relaxes deterrence and, as will be shown below, effectively decreases compensation to victims.

A. The No-Contribution Rule Fosters Greater Deterrence

Joint and several liability is a necessary adjunct to the deterrent effect which Congress intended for the antitrust laws. Any single conspirator, regardless of the culpability of its companions, may be held liable for all damages. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 144 (1968). Joint and several liability has always been viewed as a deterrent to intentional wrongful activities. Moreover, it is most fairly applied precisely in the antitrust context, where there would be no crime at all without the existence of multiple intentional wrongdoers.

The petitioners and certain *amici* have argued that a rule of contribution would further the goal of deterrence of antitrust violations because it would ensure that every defendant would pay at least something. This argument is suspicious, coming out of the mouths of the companies whose conspiratorial conduct is sought to be deterred, and it is untrue in fact.[11]

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[10] The stern sanctions of the antitrust laws contrast sharply with those imposed by Congress under other statutes such as the securities laws, where only single damages are recoverable and plaintiffs' attorney fees are not imposed on the defendants. Even if certain lower court decisions to allow contribution in other contexts were correct, *e.g.*, *Kohr* v. *Allegheny Airlines, Inc.* 504 F. 2d 400 (7th Cir. 1974) (airline accidents), *Glus* v. *G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980) (Title VII), contribution should not be allowed in the antitrust context because of the need to strongly deter such violations, encourage private lawsuits and fully compensate victims.

[11] *Amici* Georgia-Pacific Corporation ("G-P") and Packaging Corporation of America ("PCA") implicitly admit that the no

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The theory that contribution increases deterrence is directly contrary to sound economic theory, as the Circuit Court noted. *Wilson P. Abraham Construction Co.* v. *Texas Industries, Inc.*, 604 F. 2d 897, 901 n. 8 (5th Cir. 1979), citing Note, *Contribution in Antitrust Suits,* 63 Cornell L. Rev. 682, 702 (1978). Economists and commentators agree that the traditional no-contribution rule discourages illegal conduct because most would-be participants are risk-averse, taking more precautions to avoid a smaller chance of a large judgment than a larger chance of facing a smaller judgment. *See* Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis,* 23 J. Law & Economics 331, 332 (1980) (hereinafter "*Easterbrook, Landes & Posner*") (which concludes unequivocally, "we make clear that a rule of no contribution provides greater deterrence to violations under the antitrust laws than any rule of contribution."); Leon, *Contribution for Antitrust Defendants,* 66 Va. L. Rev. 797, 820, 821 (1980), (hereinafter "*Leon*") (which concludes that with *per se* violations like price fixing, the greater deterrence provided by a no-contribution rule is to be preferred).

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contribution rule produces greater deterrence when they argue, Brief at 15, that the denial of contribution leads to overdeterrence. Although they complain of chilling socially beneficial conduct, Brief at 20 n. 29, the very case they cite, *Broadcast Music, Inc.* v. *Columbia Broadcasting System,* 441 U. S. 1 (1979), draws the distinction between "naked price-fixing schemes," like the scheme in M.D.L. 310, and practices of questionable or marginal legality. 441 U. S. at 13. In *United States* v. *United States Gypsum Co.* 438 U. S. 422, 440-41 (1978), this Court also distinguished between *per se* antitrust violations, like those of which Mead was recently found guilty, and other conduct which is not *per se* illegal. The Court noted that *per se* illegal conduct has "unquestionable anticompetitive effects," while other conduct may or may not be anticompetitive, depending on the circumstances and the purposes it is serving. Furthermore, the jury verdict of Mead's guilt in M.D.L. 310 and the Seventh Circuit rulings in *United States* v. *Consolidated Packaging Corp.*, 575 F. 2d 117 (7th Cir. 1978), illustrate the fact that overdeterrence is not a problem in the paper industry.

In addition, the no-contribution rule helps prevent the type of cost-benefit analysis of a potential price-fixing conspiracy that would so readily occur if each defendant knew in advance that it would have to pay only a predictable share of the conspiracy damages. *See Leon* at 820. Because the goal of the antitrust laws is to discourage *all* price-fixing, and not just that which is cost-inefficient to the corporation, the no-contribution rule should be retained.

B. Contribution Would Unduly Interfere with the Manageability and Settlement of Antitrust Actions

This Court has consistently recognized that private actions are an "important weapon of antitrust enforcement" and has endorsed the need to eliminate complexities that would discourage private enforcement. *Illinois Brick Co.* v. *State of Illinois,* 431 U. S. 720, 745 (1977); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp,* 392 U. S. 481, (1968). Courts must be attuned to the needs of plaintiffs to manage antitrust actions which are already "most complex." *Cotton* v. *Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977). Settlements are an extremely important element of plaintiffs' ability to manage their case. *See, e.g., In re Corrugated Container Antitrust Litigation,* 84 F.R.D. 40 (S.D. Tex. 1979); *Leon* at 821 n. 166.[12] A rule of contribution would pose difficulties to manage-

[12] Indeed, in a neutral context outside the adversary process, prominent defense counsel have conceded that contribution is unworkable.

> To allow contribution among conspirators would, however, add new complications to the inextricable maze of class antitrust litigation. . . . To permit defendants to seek contribution from one another would . . . greatly complicate antitrust litigation which is already labyrinthine. Plaintiffs might even lose control of their cases with defendants vouching in other members of the industry and filing cross-claims against one another.

Izard & Miller, *High Price-Fixing Awards Require Abolition of Joint, Several Liability,* 1 Nat. Law J. 22, 23 (August 27, 1979).

ability in general, and to settlements in particular, in all stages of the case.

A rule of contribution would produce such a proliferation of claims that it would undermine plaintiffs' ability to manage their case. In M.D.L. 310, for example, the existence of 38 defendants could produce over 1400 potential cross-claims for contribution. Even where all significant conspirators were named as defendants by plaintiffs, as in M.D.L. 310, the cross-claims which would remain even after plaintiffs had settled with some defendants would make discovery and trial protracted, confusing, and unwieldy. Plaintiffs' claims could become lost among the multitude of defendants' claims. The burden on the judicial system would also be enormous.[13] Facing such lengthy and complex litigation, many potential plaintiffs would be chilled from bringing suit. Furthermore, settlement would be unlikely in this morass of defendants' claims because as a practical matter no settlement could be effected unless it included all defendants so that each settlor could be assured of protection from other defendants.[14]

Settlements are also important as a means of reducing litigation expenses, which could escalate out of all bounds if, for example, the 1400 claims for contribution in M. D. L. 310 were

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[13] The trial in M.D.L. 310 took 4½ months when tried against only three defendants, two of whom settled before the trial was completed. If cross-claims for contribution had also been in the case, the trial could have easily taken a year or longer.

[14] "Claim reduction" is no answer to this problem for, as explained below, claim reduction prevents settlements. See pp. 26-29 *infra*. The situation envisioned in *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 408 (1975), where simultaneous settlements with all the defendants have been possible in admiralty or personal injury cases, is virtually impossible in antitrust cases because of the large number of diversely situated defendants who are typically members of such conspiracies. Coordinated settlements with all such defendants in a case such as M.D.L. 310, involving 38 co-defendants, is simply not possible.

tried to a jury. Plaintiffs are typically out-of-pocket all the litigation expenses for several years even with settlements. The expenses, and the period of time before expenses were recoverable, could multiply several score if settlement could not be reached.

Certain *amici* paint a picture of a so-called settlement stampede which occurs under the no-contribution rule. However, scholars who have studied the mechanics of settlement conclude that if contribution were allowed, a mirror-image stampede *not* to settle would occur. *See Easterbrook, Landes & Posner* at 362; *Leon* at 819. Professor Leon concludes that with contribution a defendant would be unlikely to settle because the defendant could save nothing but litigation costs; moreover, if the settling defendant were still liable to other defendants for a contributive share even after settling with the plaintiffs, the would-be settlor would remain in the case and would not save even litigation expenses. There would, quite simply, be no incentive to settle.

The inhibitions which contribution would create for settlements were considered by the Commission on Uniform State Laws. The Commissioners concluded that impediments to settlement were far more serious than the supposed problems of collusion which defendants typically raise, and that contribution should not be allowed where settlements have been made:

> It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit.

See Commissioners' Comment § 4(b). The Commissioners concluded that the former rule allowing contribution against settlors made settlements impossible and, furthermore, accomplished nothing in preventing collusion. *Id.* Therefore, the revised Uniform Contribution Among Tortfeasors Act, even while allowing contribution in some cases,[15] specifically dis-

[15] As noted above, even the U.C.T.A. does not allow contribution where intentional conduct is involved. § 1(c).

allows contribution against defendants who have settled in good faith. U.C.T.A. § 4(b). If contribution were adopted, it should not apply where good-faith settlements have been reached.[16]

III. THE NO-CONTRIBUTION RULE IS FAIR

A. There Was No Coercion, Intimidation or "Settlement Stampede" in M.D.L. 310

In their *amicus* briefs, the M.D.L. 310 defendants supporting contribution spin out a tale of alleged abuse, coercion, blackmail and visions of a Texas-style stampede by the defendants to pay millions of dollars to the Corrugated Class in settlement, even though they claim that none of them was guilty of any wrongdoing. Mead's *amicus* brief is a compendium of every known epithet and pejorative to debase class actions as a procedural device. The villain in this piece is a combination of the class action under Rule 23 and the long-standing rule against contribution and claim reduction in anti-trust litigation. The problem with this supposed horror story in M.D.L. 310 is that it bears little resemblance to the truth.

First, there was no coercion or intimidation and no settlement stampede in M.D.L. 310. It is true that after the class was certified by the district court, the M.D.L. 310 defendants' interest in settlement quickened. By this time Class counsel had begun to examine the hundreds of thousands of documents produced by the defendants to the grand jury in the criminal

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[16] There is no reason to apply contribution to class actions as a means of preventing collusion because Rule 23 of the Federal Rules of Civil Procedure, which requires court approval of all settlements, guarantees that in class actions *all* settlements are made in good faith. Certain *amici's* claims of "sweetheart deals" and "extortionate settlements" are pure fiction, for the district court is charged with the responsibility of insuring that all class action settlements are fair and reasonable under Rule 23(e). Therefore, class action settlements, once approved by the district court, should automatically preclude contribution claims.

proceeding, and it became clear that the corrugated container industry for many years was infected by widespread price fixing. Thus the M.D.L. 310 defendants were anxious to settle, not because of any coercion but because they legitimately feared that if they went to trial they, like Mead, would be found guilty of conspiring to fix prices.

Second, the settlements in M.D.L. 310 can hardly be described as sweetheart deals as the defendants there paid more than $300 million to settle the Class' claims. Each defendant's situation was analyzed according to its particular facts and circumstances before any settlement was reached. The Class was aware early in the case that the defendants were of varying degrees of guilt and varying solvencies. In addition, there were very different quanta of admissible evidence available against each defendant. As discovery proceeded, the Class' expectation of success at trial increased with respect to most defendants and decreased with respect to a few. Some defendants presented economic hardship cases, and that factor bore heavily on the size and timing of the settlement with those defendants.[17]

Moreover, because M.D.L. 310 was a class action, as each settlement was reached, the Class presented it to the district court for approval pursuant to Rule 23. As required by that Rule, each settlement was closely scrutinized by the district court for its fairness, reasonableness and adequacy. The motions seeking approval of the settlements were supported by substantial evidentiary material, economic data compiled by

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[17] Not desiring to cripple small independent firms competing in the corrugated industry, the Class agreed to settle with Consolidated Packaging Corp. and Interstate Container Corp., M.D.L. 310 defendants in demonstrable financial difficulty, at greatly reduced figures. These hardship defendants also cooperated with the Class in providing information about the workings of the conspiracy. Mead and other M.D.L. 310 *amici* have conspicuously omitted any reference to these hardship settlements in their briefs.

expert witnesses and a detailed description of the negotiations leading to each settlement. All settlements except for Westvaco, which settled during trial, expressly stated that each settling defendant's sales would remain in the lawsuit, and that by settling with certain defendants, the Class was not waiving its claims against any other, non-settling, defendant. For each defendant, the district court concluded that the settlement had been reached through arms-length negotiation and was fair, adequate and reasonable.

Finally, M.D.L. 310 did not involve any hint of collusion or "sweetheart deals," and there can be no allegation that the plaintiff Class failed to sue any conspirators out of whim, fear or spite. M.D.L. 310 presented a typical horizontal price-fixing scheme, where dozens of manufacturers of corrugated products exchanged current price information and agreed to maintain or raise prices to their customers. It is highly significant that 7 of the 20 M.D.L. 310 defendants found by the jury to have conspired to fix prices with Mead were not indicted in 1977 by the grand jury. Each of those unindicted defendants paid varying but substantial sums in settlement of the class claims against them. The price-fixing engaged in by the defendants in M.D.L. 310 was the same type of blatant price-fixing in the sister folding cartons industry which was fully exposed by the court in *United States* v. *Consolidated Packaging Corp.*, 575 F. 2d 117 (7th Cir. 1978). M.D.L. 310, like *Consolidated Packaging*, is a classic price-fixing case.

Mead alone of the M.D.L. 310 defendants chose to take its case to a jury, which returned a verdict of guilty against Mead for conspiring to fix prices with 20 other M.D.L. 310 defendants. No one coerced or intimidated any innocent M.D.L. 310 defendant to settle with the Class. No rational business manager will pay substantial sums in settlement of claims believed to be groundless. Such conduct violates the basic cost-benefit analysis that governs the decision-making process in any business. Experience over the years has shown that in case after

case, defendants convinced of their innocence but faced with substantial potential liability in antitrust class actions have had those actions dismissed for want of legal sufficiency or tried those cases to fact-finders who found them innocent of wrongdoing.[18]

B. The No-Contribution Rule Is Fair, Particularly in Actions Brought Under Rule 23

The protestations of unfairness by certain Corrugated defendants simply do not withstand scrutiny. First, there was no "unfairness" to the Corrugated companies at the critical time at which they made their decisions to fix prices. Each company had the ability from this *ex ante* position to weigh the benefit it would receive from expected illegal gains against the likelihood that it would be convicted and held responsible for the full treble damages caused by the conspiracy. *See Easterbrook, Landes & Posner* at 342-44. If those damages were sufficiently unattractive, each company should have steered clear of anti-competitive conduct. Having decided to participate in the conspiracy, no defendant should be heard to complain or allowed to change the rules simply because it was caught.

Furthermore, there was no unfairness at the time that each defendant's settlement decision was made. In M.D.L. 310, unlike the *Texas Industries* and *Bowman's, Inc.*, cases, no major co-conspirators were omitted from suit. Even after suit was filed, no single conspirator was more likely than another to be called upon to pay the damages of the conspiracy. In addition, each settlement in M.D.L. 310 was scrutinized by the district

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[18] *See, e.g., In re Auto Fleet Antitrust Litigation,* M.D.L. 65 (N.D.Ill.) (national class action for price fixing against General Motors Corp., Ford Motor Co., and Chrysler Corp.; defendants found not liable after bench trial); *In re Nissan Antitrust Litigation,* 577 F. 2d. 910 (5th Cir. 1978) (national class action for price fixing against Nissan and dealers; defendants found not liable after jury trial); *In re Fine Paper Antitrust Litigation,* M.D.L. 323 (E.D. Pa. 1980) (state class action for price fixing against fine paper manufacturers; defendants found not liable after jury trial); *Phillips* v. *Chicago Mercantile Exchange,* No. 70 C 1216 (N.D. Ill. 1978) (national class of futures contract purchasers; defendants found not liable after jury trial).

court pursuant to Rule 23, as discussed above, n. 16, and could not have been approved if it were unfair or collusive.[19]

When all prominent conspirators have been sued, there is no unfairness when viewed *either ex ante* or *ex post*. As commentators have concluded, "the case for a contribution rule as a means of preventing unfairness is unpersuasive." *Easterbrook, Landes & Posner* at 344.

The plea for "fairness" to antitrust conspirators is nothing but a plea for leniency and for an end to joint and several liability. The M.D.L. 310 *amici* who favor contribution really seek to limit their exposure to only a small fraction of the damage caused by the conspiracy. To fashion a "fairer" system, in their scheme, would completely dilute these very sanctions which were carefully built into the antitrust laws by Congress. These *amici* are confusing strictness, which is essential to deal with the type of conduct in which they have engaged, with unfairness. There is no unfairness in a strict but clear rule which insures that conspirators will pay for all the harm done by any conspiracy in which they choose to participate, and which says that once they have chosen to conspire, any one of them may be held responsible for the damages caused by all.

Commentators have observed that complaints of unfairness largely result from the doctrine of joint and several liability, and to the extent that this doctrine is desirable in antitrust cases, the argument of unfairness carries less weight. *See, e.g., Leon* at 817. Every conspirator must be held liable for all damage caused until that conspirator takes sufficient steps to extricate itself from the conspiracy. Because each conspirator is regarded as a vital link in the combination which causes all the

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[19] The requirement of district court approval of class settlements insures that there will be no collusive settlements. Therefore, the reasoning of cases like *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A. 2d 24 (1954), where the court's decision was based largely on the interest in preventing collusion between the plaintiff and certain of the defendants, has no application here.

damages, *see, e.g., Baughman* v. *Cooper-Jarrett, Inc.*, 391 F. Supp. 671, 678 (W.D. Pa. 1975); *Riss & Company, Inc.* v. *Association of American Railroads*, 170 F. Supp. 354, 370 (D.D.C. 1959), the rule of joint and several liability is fair and necessary in such cases. If lesser sanctions are imposed, conspiracies will not be deterred.

Even if there were some form of "fairness" that would be enhanced by contribution, that fairness would work to the advantage of intentional wrongdoers at the expense of their victims. The severe problems which would result with respect to management and settlement of antitrust cases should not be tolerated when the benefits would accrue only to price-fixers whose illegal conduct should have been deterred in the first place. The purpose of the antitrust laws is not to provide leniency to the perpetrators of conspiracies at the expense of their victims.

IV. THE PROPORTIONAL CLAIM REDUCTION PROPOSED BY CERTAIN *AMICI* IS IMPROPER

Although the case now before the Court involved no settlement, certain *amici* would have this Court go beyond a decision on the propriety of contribution to deprive plaintiffs of a portion of the damages specifically provided by the antitrust statutes under the guise of "claim reduction." Because this question is not presented by the case now actually before the Court and because the issues, policies and factors relating to claim reduction are so complex, resolution is best left to a case which squarely presents the issue.

Should this Court feel compelled to reach the issue of claim reduction at this time, however, this *amicus* respectfully suggests that adopting the form of proportional claim reduction proposed by certain Corrugated defendant *amici* violates the fundamental purposes of the antitrust statutes and would render multi-defendant antitrust actions totally unworkable.

Not only would the deterrent purpose of the antitrust statutes be eroded by claim reduction as much as, or more than, a rule of contribution, but claim reduction has the additional evil of totally emasculating the primary goal of full statutory compensation for victims. Claim reduction is, in essence, contribution from victimized plaintiffs, whom the statutes are specifically designed to protect, rather than from equally culpable defendants, against whom the statute is focused. Furthermore, as described in detail below, a rule of claim reduction would make antitrust actions, and particularly class actions, tremendously difficult to litigate and often impossible to settle, even where settlement is supported by *every* relevant factor.

Finally, it should be noted that a *fair* form of claim reduction is already in effect in antitrust cases. *Baughman* v. *Cooper-Jarrett, Inc.*, 530 F. 2d 529, 533-35 (3d Cir. 1976); *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368, 397-98 (9th Cir. 1957). Under "*pro tanto*" claim reduction, the plaintiff's total claim is always reduced by the actual amount previously received in settlement, to avoid permitting any recovery in excess of actual prescribed damages.[20] In antitrust actions, *pro tanto* claim reduction has the salutary effect of permitting full compensation in the amount of the damages (trebled) as specifically provided by Congress while preventing duplicative recovery; it preserves the fair, time-honored and effective congressional mandate on damages which the form of claim reduction proposed by certain *amici* would eliminate.[21]

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[20] *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 328 (1971); *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 512-13 (1964).

[21] If a new rule of proportional claim reduction were created, it should be given purely prospective application under the test enunciated in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971); *see also Linkletter* v. *Walker*, 381 U. S. 618 (1965); *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964); *Great Northern Ry. Co.* v. *Sunburst Oil & Pipeline Co.*, 287 U. S. 358 (1932).

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A. Claim Reduction Need Not and Should Not Be Decided at This Time

Remarkably, petitioner Texas Industries argues for *pro rata* claim reduction even though settlement is not an issue in its case before this Court. As no settlement was involved, there was no question of claim reduction ruled on by the Fifth Circuit in that case.[22] Even if contribution were allowed, this would not be an appropriate occasion for this Court to consider claim reduction. Claim reduction is only one of many possible ways of allocating contribution damages, and it raises numerous complex issues which are discussed here only to the extent of the limited space available. The entire issue would best be addressed in a case which squarely raises the issue, which this case does not.

B. The Existing, *Pro Tanto* Claim Reduction Rule Alone Comports with the Statutory Framework of the Antitrust Laws and Should Not Be Altered by the Courts

As noted above, *pro tanto* claim reduction has always been applied by federal courts in antitrust cases in which settlements have been reached with some, but not all, defendants. *Pro*

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Proportional claim reduction would overturn an 80-year precedent of confining claim reduction to the *pro tanto* amount received, and it would frustrate the statute's compensatory goals without furthering any of its deterrent purposes. The sole benefits would accrue either to Mead, which was found guilty, or to the settling defendants, who expressly bargained that their sales would *not* be removed from the lawsuit. Retroactive application of such a new rule would cause a severe and substantial hardship to the M.D.L. 310 Class, which settled in reliance on the established law, and which expressly reserved the settlors' market shares. As a matter of equitable doctrine, the well-established right which the class retained should not be taken from them by retroactive application of a new rule.

[22] Even in M.D.L. 310 there has never been a final ruling by the district court on claim reduction, and the Court of Appeals for the Fifth Circuit therefore dismissed the appeal on claim reduction for lack of jurisdiction. *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. Oct. 30, 1979).

tanto claim reduction alone is also in effect in 26 of the states which allow contribution.[23] Only 7 states permit any form of proportional claim reduction. *Pro tanto* reduction is also incorporated in the Uniform Contribution Among Tortfeasors Act[24] and has even been applied by many courts in connection with securities law violations, where contribution is authorized by statute. *See, e.g., MacKethan* v. *Burrus, Cootes & Burrus,* 545 F. 2d 1388 (4th Cir. 1976); *Herzfeld* v. *Laventhal, Krekstein, Horwath & Horwath,* 540 F. 2d 27 (2d Cir. 1976).

Pro tanto claim reduction is fair to all parties, does not discourage settlements, and fulfills the statutory purpose of providing the injured party with a complete recovery. This

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[23] *Pro tanto* claim reduction is in effect in the following states: Alaska, *Arctic Structures, Inc.* v. *Wedmore,* 605 P. 2d 426 (Alas. 1979); California, *American Motorcycle Assoc.* v. *Superior Court of L.A.,* 578 P. 2d 899 (Cal. 1978); Colorado, Col. Rev. Stat. Tit. 13, Art. 50.5-105(a); Delaware, Del. Code Ann. Tit. 10 § 6304(a); Florida, F. S. A. § 768.31(5)(a); Hawaii, Haw. Rev. Stat. § 663-24; Idaho, Idaho Code § 6-805; Illinois, Ill. Rev. Stat. ch. 70 § 302(c); Maryland, *Maryland Lumber Co.* v. *White,* 107 A. 2d 73 (Md. 1954); Massachusetts, Ann. Laws Mass. ch. 231B § 4(a); Missouri, Vernon's Ann. Mo. Stat. § 537.060; Nevada, N. R. S. § 17.245 (2); New Hampshire, N.H. Rev. Stat. Ann. § 507;7-b; New Mexico, N.M. Stat. Ann. § 41-3-4; North Carolina, N.C. Gen. Stat. § 1B-4(1); North Dakota, N.D. Cent. Code § 32-38-04(1); Ohio, Ohio Stat. Ann. § 2307.32(f)(1); Oregon, Ore. Code ch. 18.455(a); Pennsylvania, P.S. § 2085; Rhode Island, R.I. Gen. Laws § 10-6-7; South Dakota, S.D. Comp. Laws § 15-8-17; Tennessee, Tenn. Code Ann. § 23-3105(b); Utah, Utah Code Ann. § 78-27-42; West Virginia, *Tennant* v. *Craig,* 195 S. E. 2d 727 (W.Va. App. 1973); Wyoming, Wy. Stat. Ann. § 1-1-113(a)(i).

[24] The U.C.T.A. provides: "[A good faith settlement or release] reduces the claim against the others [non-settling defendants] to the extent of any amount stipulated by the release . . . or *or in the amount of the consideration paid for it,* whichever is the greater." (emphasis added) § 4(a). Even the earlier version of the Act, which permitted contribution against settling defendants, did not deprive plaintiffs of the ability to pursue the remainder of their claim against any non-settling defendants.

form of claim reduction is especially fair in class action cases, where collusion is prevented by the requirement under Rule 23 that all settlements be approved by the court. *See* Fischer, *Contribution in 10b-5 Actions*, 33 Bus. Law. 1821, 1832-35 (1978).

Furthermore, the *pro tanto* form of claim reduction was endorsed by Congress in the Antitrust Improvement Act of 1976, 15 U. S. C. 15(c), which specifically provides that damages determined in attorney general actions shall be reduced by the amounts received from other sources. Thus, the antitrust statutes reflect a congressional intent to guarantee a full trebled recovery. *Pro tanto* claim reduction, already in effect, accomplishes this end and is fair, because it gives non-settling defendants credit for partial settlements received without rewarding them for their refusal to settle nor permitting multiple recovery. This long-established but limited form of claim reduction, both relied upon and expressed by Congress in the provisions for treble damages and the limitation on reduction of recoverable amounts, is even less suited for alteration by the Court than is contribution for all of the reasons discussed at pages 6-10, *supra*.

C. The Proportional Claim Reduction Proposed By Certain *Amici* Would Violate the Intention Of Congress to Fully Compensate Victims Of Antitrust Violations

The form of claim reduction proposed by defendants under the guise of "fairness" is particularly insidious and of vastly greater harm than any rule of contribution. Contribution from other defendants decreases deterrence, but at least it fully compensates the plaintiffs. Claim reduction has the additional evil of diminishing plaintiffs' recovery to less than the remedy expressly prescribed by statute. Claim reduction is really a form of contribution from the innocent plaintiffs rather than, like contribution, merely an allocation among admittedly guilty defendants. Claim reduction would thus defeat a primary

purpose of the antitrust statutes: compensation of victims. *Pfizer, Inc.* v. *Government of India*, 434 U. S. 308, 314 (1978); *Illinois Brick Co.* v. *State of Illinois*, 431 U. S. 720, 746 (1977).

Under a proportional claim reduction scheme, plaintiffs could never recover their full damages if they settled with any defendant. Because settlements are based on compromise, no defendant would ever be expected to settle for its full "share" of the conspiracy damages. Nonetheless, under the proposed scheme, as a result of settling with any defendant, the plaintiffs would be releasing that defendant's "share" of the damages. Certainly if contribution were allowed in antitrust cases, it should not be coupled with a rule that would in essence take the contributive share from the victim and credit it to the benefit of the co-conspirator.[25]

D. Proportional Claim Reduction Would Make Settlements Impossible and Render Antitrust Cases Extremely Complex

Claim reduction would drastically alter and interfere with the strong policies favoring settlement of controversies. *See, e.g., Cotton* v. *Hinton*, 559 F. 2d 1326, 1331 (5th Cir. 1977); *Florida Trailer and Equipment Co.* v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). First, claim reduction restricts settlement by ignoring certain key considerations intrinsic to plaintiffs' evaluations of settlement, including salient factors such as the likelihood, difficulty or cost of proving liability; the existence of class certification; the stage of the proceedings; and the solvency of the particular defendant.

Furthermore, the mechanics of claim reduction may not even permit true "peace." The result of this too blunt approach is to deter or prohibit settlements with fewer than all of the defendants. Any form of claim reduction other than the *pro tanto* method already in effect would lead to the inevitable result that a plaintiff who was confident of prevailing against at least one defendant at trial *would never settle with any defendant at all. See Leon*, at 819; *see also* Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill. L. Rev. 829, 863 (1979).

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[25] Although claim reduction has been presented by *amici* as an equitable principle, it is sought by parties with unclean hands, namely those who are actually found at trial to have engaged in a conspiracy in violation of the antitrust laws.

Claim reduction will also inhibit settlements because it prevents settlements at lesser amounts with defendants against whom admissible proof may be sparse. If the Court creates a rule of proportional claim reduction, a plaintiff could not settle inexpensively with such a defendant without waiving a much greater portion of its damages, nor could the court approve such a settlement under Rule 23. It is often in the best interest of both the plaintiff and such a defendant to settle for a smaller amount than the plaintiff would demand from a defendant, like Mead, whose guilt is easier to prove at trial.[26]

Furthermore, the only form of proportional claim reduction which would allow settlements with defendants against whom there is less proof, requiring proof of the actual culpability of the settlors, would create other manageability problems. First, the court would face the absurdity of a plaintiff attempting to prove non-liability of each settlor, while the non-settling defendants attempted to prove each settlor's complicity in the

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[26] It is ironic that so many *amici* argue the plight of the supposedly less culpable defendants like Green Bay Packaging, while simultaneously arguing for claim reduction, for it is clear that if proportional claim reduction were the rule, the class could not possibly have settled for reduced amounts with Green Bay or any other defendant against whom there is less inculpatory evidence. The least meritorious claims would thereby be forced to remain before the already overburdened court.

It should also be noted that certain *amici* are less than candid when they discuss the supposed innocence of Green Bay. While *admissible* evidence against this defendant was scarce, there was sufficient inculpatory evidence to induce the Justice Department to identify *eleven* Green Bay employees as co-conspirators in the letter of J. Albert Kroemer, July 21, 1978, filed as a bill of particulars in the criminal case in the corrugated industry. Furthermore, the fact that Green Bay was not found to have conspired with *Mead* to fix prices does not mean that Green Bay did not conspire with other defendant companies. Only Mead chose to go to trial in M.D.L. 310 and only the identity of *its* co-conspirators was presented to the jury for deliberation.

conspiracy. *See Leon* at 819. As a consequence, all defendants would be actively involved in the case through trial. This would not only make the case extremely unmanageable, but would itself discourage settlements because the would-be settlors would receive no peace.

A second drawback of claim reduction is that it prevents beneficial "hardship" settlements. For example, plaintiff may decide to settle for reduced amounts with a particular defendant which is financially weaker than its co-conspirators, as was actually done in M.D.L. 310 with Interstate Packaging Corp. and Consolidated Packaging Corp. Such settlements are beyond reproach because a full judgment would not be collectible and because further litigation and judgment could bankrupt the defendant and actually injure competition. Nonetheless, by their version of claim reduction, defendants seek a better result than they would receive even if contribution were allowed, because a right of contribution against an insolvent co-defendant would be worthless; defendants are in essence asking the plaintiffs to bear the loss attributable to insolvent defendants. Because the plaintiffs could not prevent the loss of a significant portion of damages for a hardship settlement if proportional claim reduction were in force, they would be prevented from settling.

It should also be noted that in the context of a class action, a claim reduction rule simply may not permit settlement. Rule 23(e) of the Federal Rules of Civil Procedure requires that the court approve any settlement. If a settlement will trigger a claim reduction which is greater than the amount of the benefit to be received by plaintiff in settlement, the court might be abusing its discretion in approving the settlement.[27] *See, e.g.,*

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[27] This situation would exist under any of the assumptions and arguments used in this section of the brief. For example, if liability of the settlors were assumed rather than proven, a low settlement with a defendant against whom there are problems of proof would trigger a

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Wainwright v. *Kraftco*, 58 F.R.D. 9, 12 (N.D. Ga. 1973) (settlement approved in part because plaintiffs could obtain remainder of their total damage from other defendants). In such a situation, it would be wiser to keep a defendant in the lawsuit and refuse to settle because of the greater financial strength or clearer liability of the other defendants.

Claim reduction is thus not the panacea of either simplicity or fairness, as certain *Corrugated* defendants have asserted. Claim reduction is plainly unacceptable and should be soundly rejected.

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claim reduction far greater than plaintiff had determined to be the value of the claim against that defendant. Similarly, where proof is costly or collectibility questionable, plaintiff's valuation of the expected recovery will necessarily be less than the claim reduction amount regardless of whether the claim reduction is based on *pro rata* or some other method and regardless of whether the liability of the settling defendants is presumed or proven.

Conclusion

For all of the foregoing reasons, the rule disallowing contribution in antitrust cases should not be changed and the novel rule of proportional claim reduction should not be substituted for the traditional rule of *pro tanto* claim reduction in antitrust cases.

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Respectfully submitted,

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